No. 126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

AMERICAN NATIONAL INSURANCE COMPANY, *Respondent*

Reply of American National Insurance Company, Respondent, to Petition of National Labor Relations Board for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ALPHA LAW BRIEF CO., HOUSTON

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CITATIONS

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The National Labor Relations Board seeks by its Petition for a Writ of Certiorari review of a judgment of the Court of Appeals for the Fifth Circuit, entered pursuant to and in accordance with its Opinion handed down February 23, 1951. Inasmuch as such Opinion has not been made part of the Board's Petition for the stated reason that same is not yet reported, we, for the convenience and ready reference of this Court, print such Opinion as Appendix A to this Reply Brief.

Question Presented

We think the statement of the "Question Presented" as set forth in the Petition is both inaccurate and inept. It seems to us that the questions presented are: ONE, whether or not Clause III of the existing contract between Respondent and Office Employees International Union, A.F. of L., Local No. 27 (hereafter called Union), is in and of itself unlawful; and TWO, whether or not Respondent has violated the Labor Management Relations Act by the manner in which it sought the inclusion of such clause in such contract. Believing that a fuller understanding of such questions requires that such Section III be read in context with the entire contract of which it is part, we also print for the convenience and ready reference of this Court such contract as Appendix B to this Reply Brief.

Statement

Briefly, the facts leading up to the Decision and Order of the Board, review of which was sought and had by Respondent in the Court of Appeals below, are:

On the 13th day of January, 1950, Respondent, having completed its negotiations in respect thereto with the Union, entered into and signed with the Union a contract (Appendix B) covering all phases of rates of pay, wages, hours of employment, and other conditions of employment of the employees of Respondent's home office in the City of Galveston, Texas, within the bargaining unit represented by such Union, as to which any negotiation had been sought. Such contract, by its terms, remained in effect until July 12, 1951; and provides that it shall thereafter be automatically renewed for additional periods of one year each, unless either party thereto shall give written notice of its desire to negotiate changes therein.

Almost at the outset of negotiations for such contract between Respondent and the Union, on the 28th day of January, 1949, an unfair labor practice charge was filed against Respondent by the Union. Pursuant to the filing of such Charge, complaint and notice of hearing thereon was issued by the Board's Fort Worth Regional Office on June 30, 1949, and such hearing was had before a Trial Examiner beginning July 26, 1949. Amongst other things with which Respondent was charged in such complaint was that its insistence on the inclusion of Clause III, or the substance thereof, in its contract with the Union constituted a refusal to bargain collectively in good faith as required by the Act. Negotiations between Respondent and the Union nevertheless continued without serious interruptions during all of the intervening time between the original filing of the complaint and the hearing before the Trial Examiner.

In his Intermediate Report the Trial Examiner specifically exonerated Respondent from any refusal to bargain collectively in good faith as required by the Act by reason of insistence of inclusion of Paragraph III in its contract with the Union in the language quoted with specific approval by the Court of Appeals below as Footnote III to its opinion. After the filing by the Trial Examiner of his Intermediate Report, contract negotiations were resumed between Respondent and the Union, and culminated in the execution of a contract between them (Appendix B). In the meantime, Respondent, the Board, and the Union through its attorneys, Woll, Glenn & Thatcher, all filed Exceptions to the Intermediate Report. It is noteworthy that the Union's attorneys did not except to the Intermediate Report insofar as it absolved Respondent of refusal to bargain collectively in good faith as required by the Act. The fact that a contract between Respondent and the Union had been negotiated and executed was made known to the Board, and a copy of such contract furnished to it prior to

the time it rendered its Decision and Order.

The net holding of the Board's Decision and Order was two-fold—FIRST, that Clause III of the contract was in and of itself unlawful, and SECOND, that Respondent, by the very act of insisting upon the inclusion of such clause in its contract with the Union had committed a per se violation of the Act. It was with such Findings and Conclusions of the Board alone that Respondent took issue in its Petition for Review filed in the Court of Appeals below. Such Court below, specifically agreeing with the Trial Examiner and disagreeing with the Board, sustained Respondent's contentions, and held "That the provisions of the contract assailed by the Board are not illegal or in anywise forbidden or prohibited; that petitioner had a right to urge and insist upon them; and that the evidence, viewed as a whole, does not * * * show any refusal of the petitioner to engage in collective bargaining, as that term is defined in the act and in the decisions of the courts."

As to whether or not Respondent had in fact (as distinguished from "in law") refused to bargain collectively in good faith as required by the Act by assuming and maintaining an adamant and inflexible position which blocked agreement between it and the Union and consummation of a contract pursuant to agreement, as the Board had found, the Court of Appeals below specifically found:

> "Because, however, of these unilateral acts, done while the bargaining was going on, and not because of any support in the evidence for the view that the employer, in insisting on the inclusion of the prerogative clause, was any less in good faith than the union was in resisting its inclusion, the affirmative clause 2(a) requiring the employer to bargain will be enforced.
>
> "While, as the event showed, the union and peti-

tione were able to at last agree on a prerogative clause in somewhat modified terms, the union continued throughout to be as vigorously opposed to any clause of that kind as the employer was in favor of it. It was not, therefore, as the board finds, the steadfastness of the employer alone, in insisting on his point. It was the steadfastness of employer and union, the one in proposing, the other in opposing, a clause of this kind, which the employer felt it ought, and the union felt it ought not, to have, which prolonged the negotiations. It was not any general unwillingness on the part of the petitioner to negotiate a contract satisfactory to itself as well as the union."

Such opinion also states:

"Of the opinion that in the quotation from the examiner's report, set out in Note 3 above,[1] the law is

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[1] "There is no doubt that respondent here had a right to insist upon the inclusion of the 'prerogative clause' in any contract. I find, contrary to the contention of the General Counsel and the Union, that clause does not fail to accord to the Union the status secured to it by certification. Respondent had a right to insist that its decisions in regard to hire and tenure of employment be not reviewable by arbitration. It had a right to refuse to agree to an increase in wages, to the designation of additional paid holidays, or to the granting of other conditions of employment more favorable than those then existing. Assuming, but of course, not deciding, that respondent's employees were ill-paid, and that respondent could well afford to grant a wage increase, it was under no legal compulsion to do so. True, the Act recognizes (Section 1) that inequality of bargaining power existing between unorganized employees and organized employers burdens commerce, but in ameliorating this condition the Act protects employees in their right to self-organization only. Economic strength is still the underlying touchstone of success at the bargaining table.

"It is argued further, however, that the intransigeance of respondent is, in itself, evidence of bad faith—that respondent by its refusal to grant more than minor or meaningless concessions had demonstrated that it did not approach the bargaining table with an open mind—that its conduct has not been that of one seeking agreement. But 'open mind' need not mean a mind without conviction nor need it mean a mind easily swayed by argument."

correctly stated, and that, in insisting on the prerogative clause, the company was not guilty of refusing to bargain, we order enforcement as to Paragraphs 1(b) and 2(a) and deny it as to Paragraph 1(a)."

It is with the foregoing quoted section of the Opinion of the Court of Appeals below that the Board takes issue and of which it seeks review and reversal.

Reasons Why Petition Should be Refused

It seems unquestioned that if Paragraph III of the contract is not, in and of itself, unlawful, Petitioner can only be guilty of refusal to bargain collectively in good faith because of the manner in which it sought by negotiation the inclusion of such clause in its contract with the Union. We submit that the question of whether or not such clause is in and of itself unlawful is, of course, one of law, and conversely, that the question as to whether or not Respondent has violated the law because of the manner in which it sought by negotiation to have such clause included in its contract is obviously one of fact.

While we have been unable to determine with any degree of certainty from the Brief filed by the Board with the Court of Appeals below, or from the Board's Petition for Rehearing, or from the Board's Petition for a Writ of Certiorari filed in this Court, whether the Board actually questions the legality of Clause III as such, or merely challenges the manner in which its inclusion in the contract was sought by Respondent, we do believe that the Board does not seriously challenge the legality of the clause as such. In support of such belief, we offer the following quotations from such Brief and Petitions filed by the Board:

"The Board's view does not imply, of course, that a labor organization may not lawfully agree for the

duration of a contract to waive its right to bargain concerning particular subjects in the area of wages, hours, and working conditions. Nor does it mean that an employer may not lawfully request the Union to agree to such a provision. * * * (Page 16, Petition for Writ of Certiorari.)

"Finally, petitioner claims that the Board's order herein invalidates its current contract with the Union, without specifying the 'particular offensive provision,' and thus leaves petitioner in a dilemma as to the negotiation of future contracts. The alleged dilemma, we submit, is altogether fictitious. Nothing in either the Board's decision or its order invalidates petitioner's current contract with the Union or any provision in it. Petitioner's conduct, which the Board found unlawful, related to the means adopted by petitioner to restrict the Union's bargaining rights during the contract negotiations, rather than the inclusion in a contract of a provision which was in itself unlawful.

"The Board's order is plainly directed, not against a restrictive prerogative clause as such, but against repetition of petitioner's insisting as a condition of agreement, that the said Union agree to (such) a provision. * * * Nothing in the decision or order restricts the right of petitioner and the Union, *through good faith bargaining*, to reach an agreement that such a provision should be included in a future contract.

"Such an agreement by the Union would mean simply that the Union had waived, for the specified period of the contract, its statutory right to bargain about the bilateral establishment of the conditions of employment covered by the prerogative clause." (Brief of the Board before the Court below, bottom of page 31, et seq.).

"Although it is recognized that the Union could have voluntarily agreed to surrender its right to bargain on these matters, the Board concluded that the

company's conditioning of any contract at all on the Union's surrender of its statutory right to bargain about these particular subjects constituted bad faith bargaining, and also that it constituted, quite apart from the element of bad faith, a per se violation of Section 8(a) (1) and (5) of the Act." (Petition of the Board for Rehearing filed in the Court of Appeals below, page 2.)

Actually, of course, there is nothing, "illegal or in anywise forbidden or prohibited" as the Court of Appeals below found in the clause as such, and counsel for the Board has consistently so admitted.

This then leaves a question of fact only as to whether or not, on the record viewed as a whole, Respondent violated the Act in the manner in which it sought in its negotiations with the Union to have such clause included in the contract. That this fact question is and remains the sole question for determination we believe clearly appears from a reading of the Board's Petition for Writ of Certiorari filed herein. Further support for such belief, we believe, is furnished by the following quotations from the Board's Brief in the Court of Appeals below:

"In short, petitioner would reduce the case to the simple question of whether there was good faith bargaining as to the inclusion of an arbitration provision in the prerogative clause. Petitioner argues that an impasse was reached on the matter and then goes to some lengths to show that, under the Act, it may not be compelled to agree to subject its determinations to review by arbitration. Needless to say, we fully agree with the latter proposition." (Board's Brief before the Court of Appeals below, page 15.)

"And if, in the instant case, petitioner had negotiated with the Union in good faith with respect to

> the matters mentioned above, and had found that, despite full consideration of their respective positions, the parties could not reach agreement upon any or all of the matters, then the parties would have reached a legitimate impasse, and petitioner's obligation to bargain with respect to those particular terms and conditions of employment would have been satisfied." (Board's Brief before the Court of Appeals below, page 34.)

The fact question presented as stated as above has been decided adversely to the Board and favorably to the Respondent on review of the record as a whole by the Court of Appeals below, which specifically found that there is no support in the evidence for the view "that the employer in insisting on the inclusion of the prerogative clause, was any less in good faith than the Union was in resisting its inclusion. * * * " This the Board has already conceded in its Petition for Rehearing in the Court below, as evidenced by the following from such petition.

> "This Court appears to have regarded the company's clause itself as if it were an ordinary subject of collective bargaining such as wages, hours, and other conditions of employment. Accordingly, the Court concluded that it was just as fair and reasonable, under the Act, for the company to insist upon including the clause in any contract as it was for the Union to refuse to do so. In effect, the Court considered that the parties reached a legitimate impasse on the issue." (Board's Petition for Rehearing, page 2.)

Under the specific holding of this Court, in UNIVERSAL CAMERA CORPORATION v. NATIONAL LABOR RELATIONS BOARD, 340 U.S.——, 71 S. Ct. 456, and NATIONAL LABOR RELATIONS BOARD v. PITTSBURG STEAMSHIP COMPANY, 340

U.S.——, 71 S. Ct. 453, both decided February 26, 1951, as well as in conformity with the specific direction contained in such opinions to the Courts of Appeals below, we believe that such review of the Record, viewed as a whole, was authorized by, and indeed required of, the Court of Appeals below herein. We further believe that such opinions of this Court preclude its review of the fact findings of the Court of Appeals below as sought by the Board in its Petition for Certiorari.

We quote from UNIVERSAL CAMERA CORPORATION v. NATIONAL LABOR RELATIONS BOARD, supra:

> "We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings, by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.
>
> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony

of witnesses or its informed judgment on matters within its special competence or both.

"* * * *

"Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

We also quote from NATIONAL LABOR RELATIONS BOARD v. PITTSBURG STEAMSHIP COMPANY, supra:

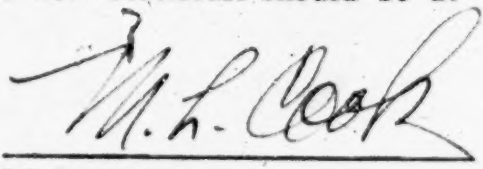
"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'"

The Board, in its Petition for Certiorari, as it did in its Motion for Rehearing, filed in the Court of Appeals below, cites the case of ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES, ETC., v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 340 U.S. 383. The specific question in that case was whether or not a Wisconsin statute requiring compulsory

arbitration of labor disputes involving public utilities could stand as against the Labor Management Relations Act which neither requires nor permits the requiring of compulsory arbitration. This Court, in determination of such question, found that "In the exercise of its judicial function (it) must take the comprehensive and valid federal legislation as enacted and declare invalid State legislation which impinges on that legislation," and, "having found that the Wisconsin public utility anti-strike law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act can not stand." Such authority, rather than furnishing any support to the Board's position contained in its petition for Writ of Certiorari, on the other hand seems to us to lend considerable support to Respondent's position as maintained in the Court of Appeals below. In fact, had such authority been on the books at the time of the submission of this case below, we would have certainly relied strongly upon it. If the State of Wisconsin can not by statute require arbitration of disputes between employer and employee, how then can the Union in this isolated, individual transaction require arbitration?

Upon examination, it appears that the decisions of the Courts of Appeals for the First, Fourth, Seventh and Ninth Circuit, being NATIONAL LABOR RELATIONS BOARD v. REED & PRINCE MFG. CO., 118 F. 2d 874, certiorari denied, 313 U.S. 595; HARTSELL MILLS CO. v. NATIONAL LABOR RELATIONS BOARD, 111 F. 2d 291; MCQUAY-NORRIS MFG. CO. v. NATIONAL LABOR RELATIONS BOARD, 116 F. 2d 748, certiorari denied, 313 U.S. 565; and RICHFIELD OIL CORP. v. NATIONAL LABOR RELATIONS BOARD, 143 F. 2d 860, cited by the Board in its Petition as conflicting "in principle" with the decision of the Court of Appeals for the Fifth Circuit here involved, simply do not so conflict in principle, or otherwise.

It is respectfully submitted that the Petition of the National Labor Relations Board for Certiorari should be denied.



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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13,198

AMERICAN NATIONAL INSURANCE COMPANY, *Petitioner*,

VERSUS

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for Review of an Order of the National Labor Relations Board, Sitting at Washington, D. C.

(February 23, 1951)

Before HUTCHESON, Chief Judge, and McCORD and BORAH, Circuit Judges.

HUTCHESON, Chief Judge: Proceeded against by the board, found guilty of violations [1] of the National Labor Relations Act, as amended, and ordered: (1) to cease and desist from

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[1] Specifically (a) of refusing to bargain collectively by insisting upon the so-called prerogative clause of the contract; and (b) of interfering with its employees in their right of self-organization by discouraging membership in a union, and bargaining collectively through a representative of their own choosing.

(a) refusing to bargin with the union by in effect insisting on the prerogative clause; and (b) from illegal interferences with its employees; and (2) upon request to bargain collectively with the union; respondent below has brought the matter to this court by petition for review, in which it seeks not to set aside the order as a whole but to modify or set it aside in part to the extent that its enforcement would outlaw, or prevent petitioner from stipulating for, the prerogative clause of the contract.

Alleging: that, on the 13th of January, 1950, after the examiner had filed his report on October 1, 1949, and before the board had, on April 5, 1950, filed its report, petitioner and the union, after completion of their bargaining negotiations, had entered into a written contract which is, and will, until July, 1951, be, in force; that in insisting upon the so-called prerogative clause with its provision against arbitration, it has not been guilty of unfair labor practices; that the net effect of the board's order is to deprive it, without due process of law, of rights guaranteed to it by law, including the right to refuse to agree to arbitration, by in effect requiring it, in any further contract negotiations, to abandon its prerogative clause and to agree to arbitration, petitioner prayed for such relief as the court might find it entitled to.

The board, in addition to answering, sought enforcement of its order, and the case is here for our appropriate action.

Neither in its petition nor in its brief does petitioner assail, or ask relief from, Paragraph 1(b) of the board's order. Its whole complaint is directed, its whole effort at relief is confined, to setting aside, as unfounded in law, Paragraph 1(a) of the order and the board's finding and conclusion that petitioner had, and has, no right to insist upon

the prerogative clause [2] of the contract, on the ground that on the record viewed as a whole the board's finding and conclusion on which this order rests is not supported by substantial evidence, and is not a lawful order, and that it may not be enforced but must be set aside and vacated.

It insists: that the purpose and effect of this paragraph of the board's order is to discredit and cast doubt upon the contract petitioner now has with the union; and that, if this court orders its enforcement, the net and inescapable effect will be to prevent petitioner from seeking in the renewal of its contract with the union to retain the same, or similar provisions as to company prerogatives and arbitration as that on which the union and the company have already agreed.

It urges upon us, therefore: that the examiner was right in concluding that petitioner had a right to insist upon the

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[2] "Functions and Prerogatives of Management. Nothing in this agreement shall be deemed to limit or restrict the Company in any way in the exercise of the customary functions of management, including the right to make such rules not inconsistent with the terms of this agreement relating to its operation as it shall deem advisable, and the right to hire, suspend, discharge, or otherwise discipline an employee for violation of such rules or for other proper and just cause.

"The right to select and hire, to discharge, or discipline for cause, and to maintain discipline and efficiency of employees, and to determine the schedules of work is recognized by both Union and Company as the proper responsibility and prerogative of management, to be held and exercised by the Company in a fair and just manner, and while it is agreed that an employee, feeling himself to have been aggrieved by any decision of the Company in respect to such matters, or the Union, in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the Company made by such top management officials shall not be further reviewable by arbitration."

inclusion of the clause in the contract; [3] that the board was wrong in its contrary conclusion that the respondent, by insisting on the so-called prerogative clause as a condition of agreement, failed to perform its statutory obligation to bargain; and that the enforcement of this Paragraph 1(a) should be denied as unfounded in law and in fact.

We agree with the petitioner: that the provisions of the contract assailed by the board are not illegal or in anywise forbidden or prohibited; that petitioner had a right to urge and insist upon them; and that the evidence viewed as a whole, does not, except as manifested by the unilateral action of petitioner during the time when negotiations were going on, in making changes and raising wages without consulting or notifying the union, show any refusal of the petitioner to engage in collective bargaining, as that term is defined in the act and in the decisions of the courts.

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[3] "There is no doubt that respondent here had a right to insist upon the inclusion of the 'prerogative clause' in any contract. I find, contrary to the contention of the General Counsel and the Union, that clause does not fail to accord to the Union the status secured to it by certification. Respondent had a right to insist that its decisions in regard to hire and tenure of employment be not reviewable by arbitration. It had a right to refuse to agree to an increase in wages, to the designation of additional paid holidays, or to the granting of other conditions of employment more favorable than those then existing. Assuming, but of course not deciding, that respondent's employees were ill-paid and that respondent could well afford to grant a wage increase, it was under no legal compulsion to do so. True, the Act recognizes (Section 1) that inequality of bargaining power existing between unorganized employees and organized employers burdens commerce but in ameliorating this condition the Act protects employees in their right to self-organization only. Economic strength is still the underlying touchstone of success at the bargaining table.

It is argued further, however, that the intransigeance of respondent is, in itself, evidence of bad faith—that respondent by its refusal to grant more than minor or meaningless concessions had demonstrated that it did not approach the bargaining table with an open mind—that its conduct has not been that of one seeking agreement. But 'open mind' need not mean a mind without conviction nor need it mean a mind easily swayed by argument."

Because, however, of these unilateral acts, done while the bargaining was going on, and not because of any support in the evidence for the view that the employer, in insisting on the inclusion of the prerogative clause, was any less in good faith than the union was in resisting its inclusion,[4] the affirmative clause 2(a) requiring the employer to bargain will be enforced.

While, as the event showed, the union and the petitioner were able to at last agree on a prerogative clause in somewhat modified terms, the union continued throughout to be as vigorously opposed to any clause of that kind as the employer was in favor of it. It was not, therefore, as the board finds, the steadfastness of the employer alone, in insisting on his point. It was the steadfastness of employer and union,[5] the one in proposing, the other in opposing, a clause of this kind, which the employer felt it ought, and the union felt it ought not, to have, which prolonged the negotiations. It was not any general unwillingness on the part of the petitioner to negotiate a contract satisfactory to itself as well as the union.

Before the enactment of the National Labor Relations Act, as amended, there was, despite the decisions of the

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[4] Though the witness Stafford did testify that the prerogative clause the employer wanted came as a complete surprise to the union and that if inserted it would take all of the union's rights away, and that in the face of the company's insistence that they must have such a clause, they made repeated efforts to by-pass it, he does testify positively (p. 48 appendix to respondent's brief):

> "He (Mr. Dibrell) wanted to know if I thought he was bargaining in good faith. I couldn't say he hadn't bargained in good faith—we had just started, **that we never could agree to the prerogative clause even if he gave us five hundred dollars a month increase in there.** * * * "

[5] **NLRB v. Whittier Mills,** 123 F. (2) 725; **NLRB v. Athens,** 161 F. (2) 8; **NLRB v. Algoma,** 121 F. (2) 603; **Farmers Grain v. Toledo,** 158 F. (2) 109; **NLRB v. Corsicana,** 178 F. (2) 344.

courts to the contrary,[6] some understandable confusion as to what "collective bargaining" required of employers. This was due to the persistence of the board in asserting and pressing its view that the use in the National Labor Relations Act of the words "collective bargaining" meant that the employer had to agree to terms proposed by the union, if in the opinion of the board these terms were reasonable, and that a failure to agree to such terms was a basis for a finding that the employer was not bargaining in good faith. Since, however, that term has been defined in the National Labor Relations Act, as amended, 29 USCA, Sec. 158(d),[7] there is no longer any basis for differences of opinion as to what it means or for board orders in effect requiring the employer to contract in a certain way.

Of the opinion that in the quotation from the examiner's report, set out in note 3 above, the law is correctly stated, and that, in insisting on the prerogative clause, the company was not guilty of refusing to bargain, we order enforcement as to Paragraphs 1(b) and 2(a) and deny it as to Paragraph 1(a).

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

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[6] **Terminal Ry. v. Brotherhood,** 318 U.S. at p. 6; **NLRB v. Bell,** 91 F. (2) 509; **NLRB v. Lorillard,** 117 F. (2) 921.

[7] "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; * * *".

APPENDIX B

ARTICLES OF AGREEMENT

BETWEEN

AMERICAN NATIONAL INSURANCE COMPANY

AND

OFFICE EMPLOYEES INTERNATIONAL UNION,
LOCAL NUMBER 27

OF THE
AMERICAN FEDERATION OF LABOR

This agreement is made by and between the American National Insurance Company, hereinafter referred to as the Company, and the Office Employees International Union, Local No. 27, hereinafter referred to as the Union.

The contracting parties desire that a maximum of well-being, contentment, and good will should result from the friendly deliberation on and fair disposition of all problems arising in the management-employee relationship.

ARTICLE I
Recognition

The Company recognizes the Union as the sole collective bargaining representative for all employees in the Home Office of the Company at Galveston, Texas, but excluding guards, secretaries to department heads and executives, agents, building and maintenance employees, professional employees, department heads and all other supervisors as defined in the Labor-Management Act.

ARTICLE II
Bargaining

Section 1: The Company, through its appointed representatives, will recognize the bona fide representatives of Office Employees International Union, Local No. 27, as the exclusive representative of all the said employees at its Home Office in Galveston, Texas, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Section 2: The Company will, pursuant to the provisions hereinafter contained, governing "grievances" provide for the handling on the Company's part of such disputes or disagreements as to interpretation and administration under the contract, presented as grievances, as shall arise during the term of the contract.

Section 3: The business representative of the Union shall have access only to the office of such representatives of the Company as shall be designated to receive him for the purpose of presenting grievances to such representative. It is, of course, agreed that the Union will keep the Company advised as to the identity of its business representative and that the Company will keep the Union advised as to the identity of the Company representative designated to discuss such matters with him.

ARTICLE III
Functions and Prerogatives of Management

Nothing in this agreement shall be deemed to limit or restrict the Company in any way in the exercise of the customary functions of management, including the right to make such rules not inconsistent with the terms of this agreement relating to its operation as it shall deem advisable, and the right to hire, suspend, discharge, or otherwise dis-

cipline an employee for violation of such rules or for other proper and just cause.

The right to select and hire, to discharge, or discipline for cause, and to maintain discipline and efficiency of employees, and to determine the schedules of work is recognized by both Union and Company as the proper responsibility and prerogative of management, to be held and exercised by the Company in a fair and just manner, and while it is agreed that an employee, feeling himself to have been aggrieved by any decision of the Company in respect to such matters, or the Union in his behalf, shall have the right to have such decision reviewed by top management officials of the company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the Company made by such top management officials shall not be further reviewable by arbitration.

ARTICLE IV
Promotions and Demotions

For the purposes of this article, the term "promotion" means the elevation of an employee from one lettered classification in the attached wage promotion plan to the next higher lettered classification, and the term "demotion" means the lowering of an employee from one lettered classification in such attached wage promotion plan to the next lower lettered classification.

All promotions and demotions shall be approved in advance by a committee to be set up and continue in existence throughout the term of this contract, consisting of three (3) members designated by the company, and two (2) members designated by the Union, which union designated members shall be employees of the Company within the bargaining unit. One of the Company designated representatives shall

act as chairman of the committee. All decisions of the committee shall be made by majority vote, the chairman voting only in case of a tie. Such voting shall be by secret ballot, each member of the committee being entitled to one vote only. The Union shall be entitled to have present, in an advisory capacity only, at such meetings, its local business representative, and an international representative, who shall be entitled to participate in the discussions, but shall not be entitled to any vote. All decisions of such committee so reached by majority vote shall be recorded in minutes to be kept of such committee's meetings and shall be final and binding upon both the Union and the Company. Union shall be furnished with a copy of such minutes.

The Personnel Department of the Company shall, from time to time, in advance of making any promotions or demotions, recommend such promotions or demotions to the chairman of the committee. Upon receipt of such recommendations from the Personnel Department, the chairman of the committee shall notify the local business representative of the Union of the names of the employees to be affected by such promotion or demotion, and the character of the promotion or demotion recommended. Upon receipt by such business representative of such notice from the chairman of the committee he shall, within one (1) week thereafter, notify the chairman of the committee of the union's desire for discussion of any of such recommended promotions or demotions by the committee, and upon receipt of such notice from the busine representative that such discussion and consideration is de red, the chairman will call such committee into session at the earliest agreeable time to all parties concerned, but in no event later than two (2) weeks from receipt of such notice from the business representative. In the event the Union, through its

business representative, shall fail to notify the chairman of the committee that it desires discussion and determination as to any of such recommended promotions or demotions within one (1) week from receipt of such notice, then the chairman of the committee shall notify the Personnel Department of the Company that it is free to make such recommended promotion or demotion.

Where the service record, physical fitness, application, ability to perform the duties of a higher position, skill and efficiency of the employees recommended for promotion or demotion are relatively equal, the committee will consider seniority as outlined and defined in the succeeding article numbered 6 hereof, as the controlling factor in the approval or disapproval of such promotions and demotions.

Nothing contained in this article shall be construed to in any manner limit the right of the Company to make such temporary assignments of work as may in its opinion be necessary to assure the uninterrupted continuance of its business.

ARTICLE V
Discharge of Employees

Section 1: The Company agrees that upon discharge of any employee, upon demand from such employee, it will furnish to such employee a written statement as to the reason or reasons for discharge, and that such discharged employee may present as a grievance, under the machinery hereinafter provided, his dissatisfaction with such discharge. If the final determination of such grievance is that such discharged employee was unjustly discharged, such employee shall be reinstated immediately to his former position without loss of seniority rank and shall be entitled to compensa-

tion for time actually lost in each work week at his regular rate of pay.

Section 2: An employee who resigns or is laid off because of lack of work will, upon his request, be furnished with a statement by the Company as to the character of his service with the Company.

ARTICLE VI
Seniority

Seniority shall be defined as the length of service since the last date of hiring. Length of service with the Company is the length of uninterrupted employment with the Company commencing with the latest date of hiring. For the purpose of promotions, seniority shall be based upon length of continuous service in the applicable job classification. The Company's record in respect to last employment date and length of service on each job classification shall be conclusive.

New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of actual employment and will receive no continuous service credit during such period. At the end of the probationary period the employee's seniority shall be retroactive to the date of hire.

Seniority will be lost by any act which breaks the continuous employment with the Company.

An employee who leaves the employ of the Company as a result of his induction into the Armed Forces of the United States, shall upon reinstatement on the Company's active payroll be given continuous service credit for the time served in the Armed Forces. Continuous service credit shall discontinue upon voluntary re-enlistment in the Armed

Services. It is understood that the Company shall reinstate as required by law, employees who left their positions upon induction into the Armed Forces of the United States.

Where a "Temporary employee" or a "Part-time employee" is permanently employed on full time, the aggregate of his temporary or part time period shall not be added to his period of regular employment in determining length of service, but his service shall date from the beginning of his most recent full time employment.

"Continuous Service" shall be broken by the quitting or discharge of an employee.

ARTICLE VII
Work Day and Work Week

The established work week shall consist of five consecutive days beginning on Monday, and the normal work day shall be eight hours of work which shall be consecutive except for a lunch period of one hour or less.

ARTICLE VIII
Wages

Section 1: The Company shall pay the employees covered by this agreement wages in accordance with Exhibit "A" attached hereto and made a part hereof (hereinafter called the "regular rate").

Section 2: For work performed not in excess of forty (40) hours per work week, the Company shall pay wages at the regular rate.

Section 3: For any work performed in excess of forty hours per work week, the Company shall pay wages at one and one-half times the regular rate. When overtime work is required in any department or section thereof such overtime

work shall be offered among the employees of such department or section thereof equally, provided, however, that the Company reserves the right to put other employees of its own choosing on such work if, in the opinion of the Company, such act becomes necessary.

Section 4: Any employee required to work on the following days shall receive pay at the rate of two times the regular rate, and if not required to work on such days, shall receive pay for such days at the regular rate.

New Year's Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day
The afternoon of Christmas Eve
The afternoon of New Year's Eve

and if any such day (other than Christmas Eve or New Year's Eve) falls on a Sunday, then the following Monday shall be observed as the Holiday.

In the event Christmas Eve and New Year's Eve fall on either a Saturday or a Sunday, the afternoon of the preceding Fridays shall be observed as such half-holidays.

Section 5: Employees of this Company shall be paid at the regular rate for scheduled working time lost from employment with this Company on account of jury service.

Article IX
Vacations and Leave

Section 1: Vacations with pay are granted after continuous full time service of one year. No vacations are granted to part time employees with less than twenty (20) hours of

service per week. Part time employees with 20 hours or more per week of continuous service for one year or more are granted one-half of the vacation credits of full time employees.

No vacation as provided in this article may be taken except during the period beginning April 1st and ending November 30th in any calendar year.

Employees whose last date of continuous employment began in the preceding calendar year receive 2 weeks vacation with pay upon completion of the first year of continuous service; except that employees whose continuous service started in December of the previous calendar year receive 2 weeks vacation with pay upon completion of eleven months of continuous service.

Employees whose last date of continuous employment began earlier than in the preceding calendar year receive two (2) weeks vacation with pay which may be taken any time in the applicable calendar year during the vacation period stated above.

An additional day of vacation is allowed in lieu of a paid holiday within a vacation period. Vacations must be taken in periods of not less than five (5) consecutive working days.

No more than two weeks of paid vacation is allowed during any one calendar year. Vacations are not cumulative from year to year.

Pay in lieu of vacation will be allowed upon termination of employment to employees whose date of continuous employment began earlier than in the preceding calendar year, provided the employee has given advance notice of at least two full weeks of his intention to terminate his employment and such termination of employment is effective after March 31st of the current year.

However, any vacation right that has been earned by employees whose continuous employment began in the preceding calendar year will be paid in lieu of vacation if termination of services occurs before the vacation has been taken.

No pro-rata vacation rights will accrue at any time and any vacation rights which a continuation of services might have secured will cease upon termination from the company's services.

"Continuous service" when used in determining vacation rights shall mean the period of uninterrupted employment from the date of last employment. The following interruptions resulting in absence from work shall not have detrimental effect upon the employee's "continuous service" record and shall be considered as time worked for the purpose of this section which is devoted exclusively to vacations:

(a) Sickness or injury, proved by a physician's certificate or absence due to sickness when excused by an authorized representative of the company of a combined duration not exceeding six (6) weeks during first year of employment or two (2) months after one (1) year of employment.

(b) Jury duty or compulsory appearance in court.

(c) Vacations in accordance with the provisions of this section.

(d) Leave of absence of two (2) weeks or less during any one year.

Leave of absence in excess of two (2) weeks for reason other than disabling illness or accident will reduce vacation rights by one-half (1/2) day for each such excess two (2) weeks of absence. Leave of absence due to sickness, injury or accident in excess of the period stipulated in part (a)

above will reduce vacation right at the option of the Company by one (1) day for each additional month of absence. The Company's record in respect to last employment date and continuous service shall be conclusive.

Vacations will be assigned by the Department Manager and insofar as possible, consideration will be given to the employee's selection of the vacation time. Employees with seniority will have first choice for vacation dates, which choice will be granted provided the operating efficiency of the Company is not, in its opinion, thereby impaired, but the Department Manager shall not be required to consider seniority for the second week of vacation if an employee desires to split the vacation, or if after selection is made, a change in schedule is desired.

The Company reserves the right to schedule vacations in accordance with the conditions and requirement assuring uninterrupted operating service.

Section 3: During the life of this agreement, the Company agrees, during each calendar year, to grant leaves of absence for such employees as may be delegated by the Union to attend State and National conventions; provided, that the aggregate of such leaves shall not exceed four (4) persons in number and three (3) weeks in length. Within these limits the Union may use such leaves of absence as it sees fit; provided, that no more than two (2) employees of the Company shall be absent upon such leaves at the same time. The Union is required to give one week's advance written notice of the identity of the employees for whom such leaves of absence are desired, and seniority in respect to promotions and in respect to choice of vacation dates as to such employees shall not be affected by such leave of absence.

Section 3: Leave of absence shall be understood to mean an absence from work without pay, requested by an employee and consented to by the Company in advance, for an agreed period of time and for good cause. Any absence from work on the part of an employee without such prior agreement and consent by the Company, or his failure to report to work at the end of such leave, may at the option of the Company, be treated as a "quitting" on the part of such employee.

Requests for leave of absence must be submitted by the employee to the Department Manager. The Company retains the exclusive right to approve or disapprove requests for leave of absence. Seniority will not accumulate during a leave of absence granted for reasons other than disabling illness or accident of the employee.

In the event of disabling illness or accident, the employee is requested to inform the Department Manager by 9:00 o'clock a.m. of the first day of absence for such cause in order to prevent possible termination of employment. Sick leave will then be allowed automatically for a period of time consistent with the nature of disabling illness or accident, but not exceeding thirty (30) days. The Company maintains the right to require satisfactory evidence or medical certificate to prove inability to work.

ARTICLE X
Discrimination and Union Activity

Section 1: The Company agrees that it will not interfere with, restrain, or coerce employees because of membership or lawful activity in the Union, nor will it, by discrimination in respect to hire, tenure of employment or any term or condition of employment, attempt to discourage membership in the Union.

Section 2: The Union agrees that neither the Union nor its members will intimidate or coerce the employees in respect to their right to work and will not attempt to force Union activity or membership on such employees. The Union further agrees that there shall be no solicitation of employees for Union membership on Company time. The Union shall not discriminate in any way as to the admission to or membership in the Union, or otherwise, against any persons who are now, or hereafter may be, employed or be restored to or reinstated in employment by the Company, provided such persons meet the requirements of the Union constitution and by-laws as to eligibility for membership.

Section 3: Both the Company and the Union recognize that neither membership nor non-membership in the Union is a requirement for the obtaining or retaining of employment with the Company.

ARTICLE XI
Strikes and Lockouts

There shall be no strikes, slow-downs or work stoppages of any kind during the life of this agreement, and there shall be no lockout of employees by the Company during said term.

ARTICLE XII
Grievances

Section 1: Discussion of request or complaint. Any employee who believes that he has a justifiable request or complaint shall discuss the request or complaint with his or her immediate superior in an attempt to settle it.

Section 2: Definition of Grievance. "Grievance" as used in this agreement is limited to a complaint which has not been settled as a result of the discussion required in Section 1

hereof, or which involves the interpretation or application of, or compliance with, the provisions of this agreement.

Section 3: Grievance Procedure.

(a) A grievance which has not been settled within 5 days as a result of the discussion required in Section 1 hereof, to be considered further must be filed promptly in writing with the employee's Assistant Department Head stating fully the nature of the grievance and the grounds for complaint or dissatisfaction. The Assistant Department Head shall answer the grievance within 10 days from date of presentation in writing, signing and dating his reply and returning one copy thereof to the employee or the steward. If the Assistant Department Head's decision is not appealed within 10 days, the grievance shall be considered on the basis of the decision made and shall not be eligible for further appeal.

(b) In order for a grievance to be considered further, it shall be appealed in writing to the Department Manager within 10 days from the date of the Assistant Department Head's written reply. An appealed grievance shall be discussed in an attempt of settlement at a mutually convenient time between the steward or employee and the Department Manager and answered within 10 days from appeal. The Department Manager's decision in writing, after signing and dating it, shall be given to the steward or employee. If the Department Manager's decision is not appealed within 10 days, the grievance shall be considered settled on the basis of the decision made and shall not be eligible for further appeal.

(c) In order for a grievance to be considered further, written notice of appeal by the business representative of the Union shall be served to the Company's Secretary, or his delegated representative, within 10 days of the date of the Department Manager's written decision. Discussion of the appealed grievance shall take place at the earliest date of mutual convenience following receipt of the notice of appeal, but not later than 15 days after notice is received by the Company's Secretary, or his delegated representative, unless by mutual agreement a different date for disposition is agreed upon.

Grievances discussed in such meetings shall be answered in writing by the representative of the Company within 15 days after the date of such meeting; unless by mutual agreement a different date for disposition is agreed upon. Whenever either party concludes that further meetings can not contribute to the settlement of the grievance, the dissatisfied party may, by written notice within 15 days from the date of the written decision of the last previous meeting, appeal the grievance to arbitration, provided the grievance is subject to review by arbitration under the terms of this contract.

Section 4: If either party shall elect to submit a grievance to arbitration, it shall give written notice to the other party of intention to arbitrate. Such notice shall contain a statement specifying the grievance. Upon receipt of any such notice, the parties shall, at the earliest date of mutual convenience, confer in an effort to select by mutual consent, an impartial board of arbitration.

The board of arbitration shall consist of one arbitrator appointed by the Union and another by the Company and a third appointed by the first two arbitrators. In the event that the first two arbitrators are unable to agree on the appointment of the third arbitrator, such third arbitrator shall be appointed by the Senior District Judge of the United States District Court for the Southern District of Texas.

The expense incident to the appointment and services of the third arbitrator shall be borne equally by the Union and the Company.

Section 5: Nothing in this Article shall be construed to deprive any individual employee or group of employees of their right at any time to present grievances to the Company or to have such grievances adjusted without the intervention of the Union, as long as the adjustment shall not be inconsistent with the terms of this contract, and provided the Union is given notice and opportunity to be present at such adjustment.

Article XIII

It is agreed that the Union shall be furnished space for the posting of proper notices, the location and area of such space to be agreed upon between the Company and the Union.

Article XIV
Conditions

This agreement is subject to the provisions of existing laws, regulations, applicable Executive Orders, and other orders of duly constituted authorities of the United States and the State of Texas, which are now and may hereafter be in force during the term of this agreement.

ARTICLE XV
Term

This agreement shall remain in full force and effect until July 12, 1951, provided, that unless one party shall give written notice to the contrary to the other party not later than sixty (60) days prior to such expiration date, this agreement shall be automatically renewed for a period of one year from such expiration date. Unless similar notice be given by one party to the other, such agreement as so renewed shall be automatically renewed for another period of one year.

IN WITNESS WHEREOF, the parties hereto have executed this agreement this thirteenth day of January, 1950.

AMERICAN NATIONAL INSURANCE COMPANY

By: L. Mosele
Secretary-Comptroller

OFFICE EMPLOYEES INTERNATIONAL UNION
Local No.27, A. F. of L.

A. G. Wilson
Jeanne V. Beal
Lee V. Imlay
Shirley Dial